MFA 71/2001
BEFORE
THE HON'BLE MR. JUSTICE S. TALAPATRA

This appeal under Section 30 of the Workmen's Compensation Act, 1923, filed by the United India Insurance Company Ltd., the appellant hereinafter, is directed against the judgment and award dated 15.06.2001 as passed by the Commissioner, Workmen's Compensation, Kamrup, Guwahati in WC Case No.140/2000.

2. By the order dated 12.11.2008, the appeal was admitted to be heard on the following substantial questions of law :

(i) Whether the learned Commissioner having regard to the pleadings of the parties and evidence on record erred in quantifying the amount of compensation treating the injuries sustained to constitute permanent partial disablement of 50% resulting in loss of earning capacity also of the same degree in absence of any assessment by a qualified medical practitioner as mandated by Section 4(1)(c)(ii) of the Workmen's Compensation Act?

(ii) Whether the learned Commissioner erred in computing the amount of compensation in accepting the wage of the workman to be Rs.2,000/-, the said being inclusive of allowances which is impermissible in law? and

(iii) Whether the learned Commissioner erred in law in directing payment of interest on the computed amount from the date of the accident?

3. The essential fact for purpose of appreciating the challenge be briefly noticed.

One Sunil Das was employed as the handyman in Bus No.AS-25/5724, owned by one Akhil Chandra Bora, respondent No.2 herein, which vehicle met an accident on 29.04.2000 while it was proceeding towards Boko from Guwahati in a place called Mirza. The claimant, the respondent No.1 suffered grievous injuries and was immediately shifted to the Guwahati Medical College & Hospital. In the said hospital, the claimant was treated for seven days as an indoor patient and thereafter his treatment continued as the outdoor patient. On the basis of the information as received by the police about the said accident, Palasbari P.S. Case No.51/2000 was registered.

4. The respondent No.2 herein, by filing a written statement, admitted that the claimant-respondent No.1 was the workman in his vehicle No.AS-25/5724 and also admitted the accident. The respondent No.2 admitted that the claimant was being paid Rs.900/- per month and in addition thereto a daily allowance of Rs.40/-. The vehicle was insured by the Policy No.130202/31/16/40/21448/99 by the United India Insurance Company Ltd., Bijaynagar Branch and at the time of accident the policy was in vogue.

5. The appellant-Insurance Company filed the written statement, raising technical objection regarding the insurance coverage etc. The learned Commissioner allowed the claimant respondent No.1 to admit the following documents in the evidence :

(a) Copy of the Police Report,

(b) Copy of the Medical Certificate/Discharge Certificate of the GMCH and Certificate of the ENT Department of the GMCH and

(c) Copy of the vehicular documents including the certificate of registration, permit, fitness and policy certificate.

6. According to the Commissioner, Workmen's Compensation, it was well established from the medical documents that the claimant had sustained grievous injuries in the said accident. The Commissioner assessed the monthly income of the claimant-respondent No.1 at [900 + (40 X 30)] Rs.2,000/-. The Commissioner for Workmen's Compensation, on treating the claimant's age at 30 years and monthly income at Rs.2,000/, calculated the compensation in the following manner :

(60% of Rs.2,000/-) x 207.98 (relevant factor for the workman's age at 30) x 50% = Rs.1,24,788/-

Thereafter, it is held that the workman is also entitled to get interest @ 12% per annum from 29.05.2000 (after a month from the date of accident). The Commissioner for Workmen was also directed the appellant-Insurance Company to make payment of the said award within thirty days from the date of the order.

7. It is true that for purpose of assessment of the permanent partial disablement, the Commissioner for Workmen's Compensation did not take assistance from any medical expert, which is the requirement of Section 4(1)(c)(ii) of the Workmen's Compensation Act, 1923. For the injuries not specified in Schedule-I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity as assessed by the qualified medical practitioner. But the injury that the workman received in the case in hand is not entirely covered by Part-I of Schedule-I of the Workmen's Compensation Act as it is evident from the finding of the Commissioner for Workmen's Compensation that the claimant-respondent No.1 received injury of absolute deafness of his right ear and at least 50% of his left ear. As such, it cannot be stated that it is a case of absolute deafness as provided in Part-I of Schedule-I of the Workmen's Compensation Act. Even, the Commissioner for Workmen has accepted that the permanent partial disablement has resulted from the injury and as such the Commissioner for Workmen was under obligation to seek assistance of a medical practitioner. It is made clear that when the claimant established the permanent partial disablement, it is the duty of the Commissioner for Workmen to ascertain the loss of earning capacity for the said permanent partial disablement by a qualified medical practitioner and thereafter assess the compensation as per the provisions of Section 4 of the Workmen's Compensation Act, 1923.

8. As corollary to what has stated regarding assessment by a qualified medical practitioner, it is necessary as well to read the provisions of Section 4(1)(c)(ii) of the Workmen's Compensation Act, 1923, which is reproduced hereunder :

4(1)(c)(ii). In the case of an inquiry not specified in Schedule-I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

In this regard, a decision of the Apex Court as rendered in National Insurance Company Ltd. Vs. Mubasir Ahmed & Anr., as reported in (2007) 2 SCC 349, appears relevant, where the Apex Court held :

Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement. In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100% loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot be maintained. Therefore, we set aside that part of the High Court's order and restore that of the Commissioner, in view of the fact situation .

9. It is evidently clear from Mubasir Ahmed(supra) that the Supreme Court did not discard the medical record as proof of functional disability even though the doctor was not examined, but the functional disability as arrived at was considered to be the assessment by the medical expert in regard to the loss of earning capacity. Therefore, according to this court, in each and every case there is no requirement of the qualified medical practitioner to come before the Commissioner and make his assessment of such percentage of compensation payable in the case of permanent total disability as proportionate to the loss of earning capacity in the case of an injury not specified in Schedule-I. If the injuries are specified in Schedule-I, there is no requirement of the doctor's assistance at all so far the functional disability is concerned. Otherwise also, if it is found from the medical records as produced by the workman and if it can be gathered from that certificate that the functional disability has been ascertained by a qualified medical practitioner on examination of the workman, the Commissioner can assess the percentage of loss of earning payable in the case of permanent total disablement proportionate to the loss of earning capacity.

10. In National Insurance Company Ltd. Vs. Bimal Nath & Ors., as reported in 2009 (1) GLT 370, this Court held :

15. Section 4(1)(c) with the explanations appended thereto, therefore, makes it clear that the workman is entitled to compensation under the said provision of law provided he suffers from permanent partial disablement resulted from the injuries suffered by him and such compensation would be such percentage of the compensation payable in case of permanent total disablement, as is proportionate to the loss of earning capacity, as assessed by the qualified medical practitioner, permanently caused by the injury. The qualified medical practitioner while assessing the loss of earning capacity for the purpose of sub-clause (ii) is also required to have due regard to the percentage of loss of earning capacity in relation to different injuries specified in Schedule-I. That means before assessing the loss of earning capacity on the basis of the injury suffered by a workman, the medical practitioner has to keep in mind the percentage of loss of earning capacity as specified, in respect of the injuries mentioned, in Schedule-I to the Act, which enlisted the percentage of loss of earning capacity in respect of different injuries ranging from 1% to 90%. The assessment to be made by the qualified medical practitioner for the purpose of sub-clause (ii) of Section 4(1)(c) cannot, therefore, be a mechanical assessment, without regard being had to the percentage of loss of earning capacity, in respect, of the Schedule-I injuries.

11. In the case in hand, the Commissioner of Workmen found on the basis of the medical certificate issued by the ENT Department of the Guwahati Medical College that the workman had suffered the permanent disablement. Profitably, the said findings are extracted hereunder :

The injuries other than ear injury are recovered to a great extent. But, as per E.N.T. certificate the claimant has suffered total loss of hearing by his right ear and the other ear is also on the verge of the severe loss of hearing capacity. As per the medical documents issued by the E.N.T. Department of G.M.C.H., the ear injuries of the claimant has been termed as follows :-

a) (Rt.) Profound Sensory Neural hearing loss.
b) (Lt.) Moderately severe sensory Neural hearing loss.

The above medical evidence which is based on Audiogram examination, it is clear that the claimant has lost hearing capacity in total by his right ear and at least 50% by his left ear. As per Schedule-I of the Workmen’s Compensation Act, 1923, the percentage of loss of earning capacity is 100% for absolute deafness . In the instant case, although the hearing capacity of one ear has been lost completely, the other ear has not lost the hearing capacity fully. But due to the loss of hearing capacity the claimant is now totally unfit to continue his previous job. It is now the established principle of law that the loss of earning capacity can be treated as 100% of the workman become unfit to perform his previous job though the percentage of physical disablement is not of that much. However, considering the unskill nature of job and other aspects particularly pains and sufferings caused to him as well as loss of hearing capacity to a great extent. I hold the percentage of loss of hearing capacity at 50%. The claimant is also out of employment since the date of accident.

12. The workman was a handyman by profession and whether for such hearing disability as pointed out, the loss of earning capacity can be assessed as 50% by the Commissioner of Workmen, in view of Section 4(1)(c)(ii) of the Workmen’s Compensation Act, is the question that has been projected in this appeal. In view of the discussion as made above, the answer must be in the negative since in the medical certificate as relied by the Commissioner of Workmen, does not bespeak of the functional disability of the workman. Therefore, it was incumbent on the Commissioner of Workmen to take assistance of the qualified medical practitioner for assessing the functional disability that the workman has subjected to for the accident for assessing the loss of earning capacity. Had it been reflected in the medical certificate, there was no necessity of taking assistance of the qualified medical practitioner, but in the instant case no such determination is available in the medical certificate. In the situation, the Commissioner of Workmen ought to have taken the assistance of the qualified medical practitioner for ascertaining the functional disability to assess the loss of earning capac

ity.

13. Another question that has been raised in this appeal is that whether the Commissioner of Workmen has committed any wrong by adding the daily allowance as part of the wage of the workman while ascertaining the loss of income. Wage has been defined in the Workmen's Compensation Act, 1923 (now Employee's Compensation Act, 1923) in Section 2(m), which reads as follows :

2(m). wages includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any person or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment.

14. The learned counsel for the appellant also relied on a decision of this Court as rendered in Oriental Insurance Company Ltd. Vs. Lakhimai Das & Anr., as reported in 2006 (3) GLT 870, where this Court has held :

11. We have examined the pleadings of the parties and the evidence on record the state of pleadings is not in dispute we however, from the evidence of the claimant find that she had deposed that her son at the time of his death had an income of Rs.3,600/-per month including daily allowances. It is thus abundantly clear from the testimony of the claimant that the amount of Rs.3,600/- included daily allowances. The question therefore is whether in ascertaining the wages of the deceased, the daily allowances an be taken note of. The definition of \wages\ as provided in Section 2(m) of the Act is quoted herein below:

2(m) wages includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any person or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment.

12. It is clear from herein above that a sum of amount paid to a workman to cover any special expenses entailed on him by the nature of his employment is not included in his \wages\ for the purpose of the Act. From the nature of the employment of the deceased, we have no hesitation to hold that the daily allowances referred to by the claimant in her deposition would not form a part of the wages as defined under the Act. On a moderate estimate, we may take that a daily allowance of Rs.20/- was paid to the deceased. Resultants an amount of Rs.600/- can be safely deducted from the amount quoted by the claimant to be the income of the deceased per month. According to us, therefore, the wages for the purpose of computing the compensation for the death of the deceased has to be taken as Rs.3000/- per month. We are, therefore, of the view that the learned Commissioners had erred in law and on facts in proceeding on the basis that the monthly wages of the deceased at the relevant time was Rs.3,500/-.

15. A close reading of Section 2(m) of the Workmen's Compensation Act, 1923 leaves no confusion or ambiguity calling for construction as the Section is inclusive in nature when it provides that the wages include any privilege or benefit which is capable of being estimated in money, but it excludes a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment. This would find support from the decision in Godavari Sugar Mills Vs. Shaukantala, reported in AIR 1948 BOM 158. But the decision as rendered in Lakhimai Das(supra) interpreted the provision of Section 2(m) of the Workmen's Compensation Act, 1923 differently.

16. In Lakhimai Das(supra), it was found by this court that the daily allowance given to the workman was for special expenses at Rs.20/- per day should not have included in the wage. But this court, finds that the monthly wage of the workman was Rs.900/-, which was far below the minimum wages prevailing at the relevant time. As such, on scrutiny it appears to this court that the daily allowance was not to cover any special expenses as it was held in Lakhimai Das(supra), but the daily allowance at Rs.40/- in this case forms part of the wage wh

ich used to be released on attendance, and as such the learned Tribunal below did not commit any wrong in accepting the wage of the workman at Rs.2,000/-.

As corollary to this, this Court does not find any substance in the submission that the daily allowance in this case cannot be included in the wage.

17. Another substantial question as advanced in this appeal is whether the Commissioner of Workmen's Compensation erred in law in directing payment of interest on the computed amount from the date of the accident. In Maghar Singh Vs. Jashwant Singh, as reported in (1998) 9 SCC 134, the Apex Court dealt with that question.

18. Approving Maghar Singh(supra), the Apex Court held in Mubasir Ahmed(supra) as under :

9. Interest is payable under Section 4-A(3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability under Section 4-A was dealt with by this Court in Maghar Singh v. Jashwant Singh. By Amending Act 30 of 1995, Section 4-A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest @ 12%. In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4-A(1) prescribes that compensation under Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub-section(2) of Section 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is \falls due\. Significantly, legislature has not used the expression \from the date of accident\. Unless there is an adjudication, the question of an amount falling due does not arise.

19. In view of this, the date relevant for charging the interest is not the date of accident nor the date after one month from the date of accident but the date of adjudication. This view of the Apex Court was modified in Oriental Insurance Company Ltd. Vs. Mohd. Nasir & Anr., reported in (2009) 6 SCC 280, where the Supreme Court has enunciated that the rate of interest would be 7.5% from the date of filing of the application till the date of the award and from the date of award the interest would be 12% till the payment is made without default. In Mohd. Nasir(supra) the Apex Court held :

&.. As therein this aspect of the matter has not been considered, we are of the opinion that interest will also be payable at the rate of 7‰% per annum from the date of filing of the application till the date of award. The rate of interest thereafter shall be payable in terms of the order passed by the Commissioner.

In case of default, definitely the import of Section 4A of the Workmen's Compensation Act, 1923 will have its sweep in the special fact and circumstances of a case. As such, charging 12% interest from the date of accident cannot be held.

20. In view of the discussions made above, except the substantial question of law whether the Commissioner erred in computing the amount of compensation in accepting the wage of the workman to be Rs.2,000/-, the said being inclusive of the allowances which is impermissible in law? are answered in favour of the appellant. Therefore, the award is required to be interfered with. The awarded sum shall carry interest in the rate as follows :

(1) from the date of filing of the application till the date of judgment @ 7.5% per annum and

(2) from the date of judgment till the date of payment @12% per annum.

21. In view of this, this case is remitted back to the Commissioner of Workmen’s Compensation for taking the opinion of the qualified medical practitioner as per Section 4(1)(c)(ii) of the Workmen’s Compensation Act, 1923, for ascertaining the functional disability and assessing the loss of earning capacity of the workman. It is made clear that it would be in the exclusive prerogative of the Commissioner of Workmen’s Compensation, all the time to take opinion of the qualified medical practitioner for ascertaining the functional disability for purpose of assessing the loss of earning from the said permanent partial disablement. The Commissioner of Workmen’s Compensation of a District may at his discretion can prepare a panel of the qualified Medical Practitioners for rendering their opinion in regard to ascertaining he functional disability and for assessing the earning capacity of a workman applied for compensation for bodily injury that he received in an accident arising out or in the course of his employment.

22. On receipt of the case records, the learned Commissioner shall determine the loss of earning capacity of the claimant-respondent on taking opinion of the qualified medical practitioner on the functional disability within a period of 1(one) month by any rate. The award, thereafter, appropriately be modified. It is made clear that if the deposited compensation has been already paid to the workman and it is found after determination that the award is lesser than the questioned award, the learned Commissioner for Workmen’s Compensation shall not go for recovery considering the economic status of the workman.

23. For the reasons as aforesaid, this appeal shall stand partially allowed to the extent as stated.

Send down the LCRs forthwith.